

MINUTES

**MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON LABOR AND EMPLOYMENT RELATIONS

Call to Order: By **SEN. DALE BERRY**, on March 4, 1999 at 3:02 P.M., in Room 413/415 Capitol.

ROLL CALL

Members Present:

Sen. Tom Keating, Chairman (R)
Sen. Fred Thomas, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Dale Berry (R)
Sen. Vicki Cocchiarella (D)
Sen. Alvin Ellis (R)
Sen. Bob Keenan (R)
Sen. Walter McNutt (R)
Sen. Bill Wilson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Gilda Clancy, Committee Secretary
Eddy McClure, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 200, HB 592, 2/24/1999
Executive Action: HB 200

HEARING ON HB 200

Sponsor: REP. JOHN COBB, HD 50, Augusta

Proponents: **Gene Fenderson, Montana Joint Heavy & Highway**

Opponents: **None.**

Opening Statement by Sponsor:

REP. JOHN COBB, HD 50, Augusta, remarked HB 200 is a bill against violating special provisions and labor practice provisions for public construction on contracts. The bill provides a penalty for violating prevailing wage law under public contract. The penalty is \$1,000 which is on line 13 of the bill. If the Labor Commissioner finds there has been an aggravated or willful violation of the standards, then the Commissioner may, up to three years, stop any of those contractors from bidding on any public works contracts. If a person from a corporation fails to comply due to gross negligence as determined by the Commissioner, now there is only a small penalty of \$1,000 to cover million-dollar contracts for the Commissioner. There have been a few cases which involve gross negligence, whether that contractor is deliberately violating the law or practicing real gross negligence. This bill would allow another an option for the Commissioner to initiate more of a penalty to these large contractors who are doing these things, whereas, \$1000 fine is not much of an incentive for them to stop. Most violations under the prevailing wage law are incorrect classification of employees or honest mistakes, but some do involve gross negligence.

Proponents' Testimony:

Gene Fenderson, Montana Joint Heavy & Highway Committee, stood in support of this bill.

Opponents' Testimony:

None.

Questions from Committee Members and Responses:

SEN. ELLIS commented regarding contracts which do not exceed 20 times \$10,000, what is allowed is the Commissioner to access a higher penalty.

REP. COBB responded that is the way the bill was first amended. It was \$1000 fine, and may be up to \$10,000 if the Commissioner determines the conduct is gross negligence.

SEN. ELLIS asked **REP. COBB** what inspired him to bring this legislation.

REP. COBB answered he looked at the law where it talks of economic development where somebody violates the law, so he wanted a level playing field for everyone. Sometime for the big contractors, it is worth \$1,000 to violate the law. He believes there should be a bigger penalty for those who violate it.

SEN. COCCHIARELLA asked for an example of gross negligence.

REP. COBB responded for instance, let's say in Bozeman a tunnel is being built. There is a bid for a contract which is too low and the Department says not to worry about it. You cannot tell a contractor not to have any bids, but a penalty bigger than \$1,000 is needed.

CHAIRMAN BERRY asked **Mike Foster, Montana Contractor's Association**, what he thought of this bill.

Mr. Foster responded it is important to recognize that enforcement is a big issue regarding the prevailing wage laws. The **Montana Contractor's Association** supports this bill because they believe people should follow the law. If they don't there should be a penalty. **REP. COBB** has drafted into his bill a penalty which is strong enough to hurt. It won't necessarily break someone, but that isn't what they want to do to a contractor, unless some horrible crime is committed. This penalty is strong enough to send a very strong message and hopefully will have a good positive result.

Closing by Sponsor:

REP. COBB asked the Committee to concur with this bill.

{Tape : 1; Side : A; Approx. Time Counter :8 - 42}

HEARING ON HB 592

Sponsor: CHASE HIBBARD, HD 54, Helena

Proponents: John Andrew, Department of Labor & Industry
Pat Sheehey, Attorney, Billings
Nancy Butler, State Fund
Tom Schneider, Montana Public Employee's Association

**Jerry Keck, Acting Administrator, Employment
Relations Division, Department of Labor & Industry
George Wood, Executive Secretary, Montana Self-
Insurer's Association
Jack Holstrom, Montana Association of Counties
Chris Gallus, Montana Chamber of Commerce
Riley Johnson, National Federation of Independent
Business
Pat Haffey, Commissioner, Department of Labor &
Industry**

**Opponents: Don Judge, Montana State AFL-CIO
Al Smith, Montana Trial Lawyer's Association**

**Informal Testimony: Judge Mike McCarter, Montana Workers'
Compensation Judge**

Opening Statement by Sponsor:

REP. CHASE HIBBARD, HD 54, Helena, conveyed HB 592 is a result of the HJR 10 study committee over the interim. The specific accomplishments of that committee has already been presented earlier in the Session.

In the last Session, HJR 10 directed the Department of Labor to put together a group over the interim to try to find ways to streamline the manner that employer-employee disputes are handled. One subject was Workers' Compensation. This was a cumbersome, time-consuming process. They had a group of 12 people and met ten times in all-day meetings, and approximately 800 man hours were spent on that project. In the group both public and private employers and employees were represented. Throughout the process, they strived to meet five goals. One goal was the importance of mediation in resolving disputes, another was the standardization of process and improving information exchange, the third was follow-ups on progress and success of changes, the fourth was streamlining the entire process, and the fifth was consistency.

REP. HIBBARD believes this bill accomplishes most of those things, however, there were things in the consensus not included in the bill, but to be implemented by the Department of Labor as it moves forward in this area.

They came out of that committee with six specific Workers' Compensation recommendations overall and 16 specific non-Workers' Compensation recommendations. There are a complicated patchwork of jurisdictions involved in Workers' Compensation. There are matters over which the Department of Labor has original

jurisdiction and there are matters over which the District Courts have jurisdiction. They tried to consolidate all those Workers' Compensation items in the Workers' Compensation Court.

In the area of Independent Contractors, they attempted to get the original jurisdiction which was in the Department also to the Workers' Compensation Court. They emphasized mediation in being prerequisite in petitioning the Court in issues relating to compensability and benefits.

The Fiscal Note reflects \$138,900 savings which is accruing because of the elimination of three Hearings Officer's positions in the Hearings Bureau, however, this is really a savings which is transferred over to reduce the shortfall in the Workers' Compensation regulatory function. There is a savings by this bill, but it transfers over to Workers' Compensation. There is an additional work load which is added to the Workers' Compensation Court. The Court has already budgeted for that. The Board of Labor Appeals has been amended back in to stay.

Proponents' Testimony:

John Andrew, Department of Labor & Industry, said it is correct the Board of Labor Appeals was restored, but with the narrow purpose of confining itself to dealing with Unemployment Insurance Benefit cases. One of the recommendations of this work group was that issues which involved Independent Contractors be streamlined to the greatest extent possible. Under current statutes, independent contractor issues can go to the District Court, the Board of Labor Appeals, and the Board of Personnel Appeals.

Judge McCarter showed this Committee a chart previously which took a whole hodge-podge of steps and put them into a very straight-lined procedure. The Independent Contractor part would be taken away from the Board of Labor Appeals and those Independent Contractor issues would go through a simple unit review so the Department is consistent. Ultimately, those issues would be decided by the Workers' Compensation Court. That is consistent with the recommendations of the work group.

One of the major portions of this bill deals with benefit issues in the Workers' Compensation arena. This legislation says all benefit issues will be treated in the same fashion with the emphasis being on mediation then adjudication by the Workers' Compensation Court as opposed to going through a contested case proceedings. There are certain matters now which are in the hands of the District Court which deal with Workers' Compensation and they now will be placed in the hands of the Workers' Compensation Judge.

The recommendations also contemplate consistent processes by the Department so that in all these various phases of employment law, we will look at an investigative phase, followed by a mediation phase, followed by a hearings process if necessary, then followed by the Court system.

Another issue deals with a certain standardization process. Currently, there can be a human rights case which is taking place, a wage claim, and an Independent Contractor issue taking place. It would help, not only to be mediating these things, but to kill all the birds with one stone. If people file these things in a certain time period, it should make it easier to consolidate them. Wage complaints should be filed within 180 days, which is the same time frame for filing an unfair labor practice or a human rights complaint. In doing that, these cases will come together sooner so they are judicated all at one time.

The work group recommended there be a statute of limitations on the filing for wage claims and penalties and that be confined to a two-year or three-year time period in the case of repetitive violations. That is consistent with the current federal standard.

This bill has some real positive benefits and **Mr. Andrew** asked for the Committee's consideration in supporting it.

Pat Sheehey, Attorney, Billings, stated he is a proponent of this bill because it streamlines the process in which worker's claims are judicated. It helps the employer in the insurance industry quickly get their claims through court. In the Workers' Compensation arena, this takes all contested case hearing with have to do with benefit claims, and bring them before the Workers' Compensation Judge, rather than bring them before the Department only to be appealed to the Workers' Compensation Judge and perhaps onto the Montana Supreme Court.

The committee has swept up statutes in the Workers' Compensation area which give original jurisdiction to the Department and they have given that jurisdiction to the Workers' Compensation Court. The only suggestion **Mr. Sheehey** has it that they have missed one statute which is 39-71-204. That statute provides the Department can resend or alter or amend orders which they have previously issued in any particular claim. That jurisdiction still lies with the Department under this bill. It is his suggestion this statute should also be amended so that people who want to get an award or order rescinded or looked at can have it in front of the Workers' Compensation Judge, especially if it has to do with benefits payable. He gave an example of one of his clients who would have benefitted from this suggestion. He would like to see this bill amended to include 39-71-204 and give the Workers'

Compensation Court jurisdiction to review previous Department orders.

Nancy Butler, State Fund, said they support the sections of the bill affecting Workers' Compensation. She suggested the Committee take a serious look at **Mr. Sheehey's** suggestion. We are dealing with an order issued by the Department in 1977. The statute in question allows the Department to review their orders, if that person is unhappy with that review, they can appeal to the Workers' Compensation Court. One of the Judge's jobs is to address an issue on appeal. Otherwise, she supports the bill as proposed.

Tom Schneider, Montana Public Employee's Association, said in this case he more represents the **Montana Board of Personnel Appeals**. He was a member of the HJR 10 committee and he would like to go on record supporting the bill. He would like to go on record supporting the fact the House reinstated the Board of Labor Appeals and feels that should be a legislative decision.

The **Board of Personnel Appeals** was created in 1973 to administer appeals classifications and the State Collective Bargaining Act. Sometime in the late 1980s, the function of appealing wage claims was added to the Board. This bill will take that function away and put the **Board of Personnel Appeals** back into its original jurisdiction and **Mr. Schneider** supports that happening.

On line 27 it appears we reduced the time period for filing claims from 18 months to 180 days. But under the current law there really is no time period for filing. This section formally dealt with penalty and a person had to file within 18 months to be entitled to the penalty but there was no date as far as filing. It was unlimited. This bill would allow filing up to 180 days which is consistent with the Human Rights Commission Unfair Labor practices under the Board and the Board grievance procedure for Highway and Fish & Game. On the following page is provided the statute of limitations on wage claims for an employer that has not shown a bad record, the employee may recover for a period of two years. If it is an employer who has shown repeated violations in the law, the recovery period could be up to three years. Those are the basic changes to their section of the bill.

Jerry Keck, Acting Administrator, Employment Relations Division, Department of Labor & Industry, explained he participated in a small employer round table discussion which **REP. HIBBARD** convened during the 1997 Session. He was also a member of HJR 10 work group which brought these proposals. Much of the implementation of this bill was with the Employment Relations Division. They

are anxious to go forward with this work and believe it is the best interest of the employers and employees to simplify and consolidate a lot of these functions and they strongly support the bill.

George Wood, Executive Secretary, Montana Self-Insurer's

Association, said they arise in support of those portions of the bill which affect them, which are the sections which deal with 39-71 and 39-72. They believe streamlining is a good thing and they have no opinion on the unemployment section as they do not pertain to their members.

Jack Holstrom, Montana Association of Counties, remarked he also worked on the work group which proposed this legislation. He urged the Committee's support of this bill.

Chris Gallus, Attorney, Montana Chamber of Commerce, said he also was a member of the work group. This bill doesn't streamline to the extent they envisioned when they began the process, but they were dealing with a lot of complex laws in different environment. Throughout the Department when those complaints are filed, the right hand will know what the left hand is doing. He urged the Committee's support of this bill.

Riley Johnson, National Federation of Business, said they also stand in support of this bill. One thing this bill does is change the perception of the ability to work through the system. That is very confusing for their people who do not have a lot of time to be traveling and going through mazes.

Pat Haffey, Commissioner, Department of Labor & Industry, alleged they support HB 592 based on serving as a personnel officer for many years. She represents both employees and employers in trying to resolve disputes. It is not comfortable for either party. It is always more costly than they count on, and it is always confusing for them, and quite often nobody wins. She believes the committee who worked on this came up with an excellent bill and she hopes it will be passed.

Opponents' Testimony:

Don Judge, Montana State AFL-CIO, stated they support much of the language in this bill, particularly getting rid of the wage claim duties of the Board of Labor Appeals and focusing on the unemployment aspects of the Board of Labor Appeals. They also believe in streamlining the process to the best extent possible.

He mentioned on page 3, line 30 of the bill, it now requires a wage claim to be filed within 180 days of the delay of payment of

wages. The lines above that appear to be striking the 18-month period of time and inserting days are two different sections of law. The 18 months apply to the penalty recoverable. What is not in this law is the fact employees who had a legitimate wage claim, have currently the right to file a wage claim essentially unlimited. Typically anywhere from five to seven years, it is still possible to file a wage claim under current Montana law. That change to 180 days is very significant impact on employees who may have legitimate wage claims. The Department is suggesting this isn't a huge deal, but this is being made for the purpose of standardizing appeals so that if an appeal on a wage claim is being filed and an appeal is being filed by the Human Rights Commission and maybe if an unemployment claim is being filed, they will all try to draw together for the convenience of government. There are cases where employees shouldn't loose out in order to make the government's process more convenient. He gave an example of what could happen. He stated they are suggesting a compromise to 24 months to at least provide an opportunity for deserving employees to recover wages.

Al Smith, Montana Trial Lawyers Association, related they have some concerns with this bill, which is the same as what **Don Judge** raised. At the top of page 4 it limits the amount of wages and penalties that a worker can receive, which is two years prior to the date the claim is filed. Even if the worker filed a claim within 180 days, according to subsection 2 he could potentially loose six months wages.

{Tape : 1; Side : B; Approx. Time Counter :42 - 58} **Mr. Smith** went on to explain on page 29, subsection 2, regarding worker's benefits being terminated because of not cooperating with the rehabilitation provider. If we are looking at streamlining, what has happened with this was there were time lines that if the benefits had been terminated and the worker seeks to have those reinstated, and that worker is suffering a brain injury, that could affect their cognitive abilities. Sometimes people with brain injuries can get belligerent and refuse to cooperate. For those type of people he would like to see the 30-day time line be put back in, so there would be some ability for that worker to get his benefits restored quickly. A 30-day period is reasonable and would be a reasonable way to protect workers.

On page 30, where it refers to the medical panel who deals with occupational disease, they have no concern with an evaluator as a panel taking a look at this, but they believe it would be more fair to the worker, that the claimant would have the ability to select an evaluator from a list of three to five qualified evaluators provided by the Department.

They also supported changes to 39-71-204 suggested by **Mr. Sheehey**. He said we should take advantage of the process now and not wait another two years.

Informational Testimony:

Judge Mike McCarter, Workers' Compensation Judge, said he would be affected by a lot of the changes in this bill. He handed out a summary of HJR 10 **EXHIBIT (las49a01)**. He also mentioned the suggestion of a time line for contesting termination of rehabilitation benefits. The 30-day period would work for him.

Questions from Committee Members and Responses:

SEN. COCCHIARELLA asked **Judge McCarter** his opinion on the proposed amendment by **Pat Sheehey**.

Judge McCarter said he wrote a memo when **Mr. Sheehey** brought it to his attention. The situation is similar to re-opening full and final compromise settlements and now the Court has the jurisdiction to do that. It has to be for a good cause. If the claimant were trying to re-open a subrogation order would have to come forward and show good cause for re-opening. He believes it is consistent, but it is up to the legislature if they want to include that.

SEN. THOMAS asked **Judge McCarter** if he were comfortable in handling the changes with his current staff?

Judge McCarter answered he is. They are already doing some re-tooling in anticipation this bill would pass. Part of the work load is offset by the fact some of the appeals coming to the Court won't come as appeals but as original jurisdiction cases, therefore there is a trade-off. In some of those cases it will be quicker and easier to hear those cases. He may have to work a few extra hours, but is comfortable in doing so.

SEN. THOMAS asked if anyone can take a case to Workers' Compensation Court.

Judge McCarter responded we do have those cases where people represent themselves. They have increases over the past couple years, they have seen more of them. They are dealing with them fairly effectively. They make it a non-intimidating process and loosen up on the procedures in the hearing. They also assist claimants who represent themselves so they know what that process is about. He has good staff available to answer procedural questions for them too.

SEN. COCCHIARELLA commented in this process we are relying more and more on mediation. She asked **Jerry Keck** if the Department had some control or training or oversight or way to guarantee that mediation doesn't become a 'split the difference kind of decision'.

Mr. Keck answered they try to hire trained people in the mediation process. They are not an advocate to either party, that is not their role. Their role is trying to ensure both parties have an opportunity to present their position, set forth what they are willing to do and not do, and help them come to a solution both parties will accept.

SEN. COCCHIARELLA asked how he guarantees there is not an erosion of the mediation process over time.

Mr. Keck responded they do not have a built in process to review that over a period of time.

SEN. KEATING asked **Judge McCarter** regarding the current scheme on Independent Contractor cases, it shows the Board of Labor Appeals in the diagram (**EXHIBIT 1**), then on the proposal the Board of Labor Appeals is not in the stream. Does it show up some place?

Judge McCarter deferred the question to **John Andrew** who answered the Board of Labor Appeals will do the uninsured benefit issues but they will not be involved in the Independent Contractor issues.

Closing by Sponsor:

REP. HIBBARD closed by mentioned there is a technical amendment **EXHIBIT (1as49a02)**. He asked the Committee to incorporate that into deliberations. He also asked the Committee carefully inspect the suggestions made. The list could go on and on of little changes which could be made. The committee who helped draft this bill spent over 800 man hours considering all this. He believes they were successful in what they set out to do. This is a very complex area and they came up with a product they felt would streamline the process, make it quicker and more efficient and more cost effective. Given the constraints of the law, this is a very large step.

EXECUTIVE ACTION ON HB 200

Motion/Vote: SEN. COCCHIARELLA moved that **HB 200 BE CONCURRED**
IN. Motion carried unanimously.

ADJOURNMENT

Adjournment: 4:00 P.M.

SEN. TOM KEATING, Chairman

GILDA CLANCY, Secretary

TK/GC

EXHIBIT (las49aad)